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Supreme Court, U.S.
FILED

No. (1) 06-610

OCT 31 2006

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In The

Supreme Court of the United States

JAMAL MOORANI,

Petitioner,

v.

ALBERTO GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was rendered statutorily ineligible for adjustment of status to lawful permanent resident because he did not depart the United States voluntarily pursuant to an order of the Board of Immigration Appeals ("BIA") that was subsequently reopened and remanded to the Immigration Judge to consider his application for adjustment of status.

2. Alternatively, whether the period of voluntary departure granted by the BIA was tolled by the timely filing of Petitioner's motion to reopen his removal to seek newly available relief in the form of adjustment of status.

3. Whether the Court of Appeals improperly affirmed the denial of Petitioner's adjustment of status on grounds that were never articulated by the Immigration Judge or the Board of Immigration Appeals, contrary to this Court's decisions in *INS v. Ventura* and *SEC v. Chenery*.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review is unreported. *Moorani v. Gonzales,* No. 04-60971 (5th Cir. May 26, 2006). App. 1.

The decision of a single member of the Board of Immigration Appeals, affirming without opinion the decision of the Immigration Judge on remand denying Petitioner's application for adjustment of status to lawful permanent resident pursuant to §245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1255, is unreported. *Matter of Moorani,* File A73 111 72 (BIA October 5, 2004). App. 6.

The decision of the Immigration Judge, denying Petitioner's application for adjustment of status following remand from the Board of Immigration Appeals to consider that relief, is unreported. *Matter of Moorani,* File A73 111 729 (United States Immigration Court. Houston, Texas, August 20, 2003). App. 7.

The decision of the Board of Immigration Appeals granting Petitioner's motion to reopen his removal proceedings for the purpose of applying for newly available relief in the form of adjustment of status, and remanding the case to the Immigration Judge for consideration of such relief, is unreported. *Matter of Moorani,* File A73 111 729 (BIA October 8, 2002). App. 9.

The original decision of the Board of Immigration Appeals, dismissing Petitioner's appeal from the Immigration Judge's order denying his application for asylum, is

unreported. *Matter of Moorani,* File A73 111 729 (BIA April 8, 2002). App. 11.

The initial decision on the Immigration Judge finding Petitioner deportable and ineligible for asylum is unreported. *Matter of Moorani,* File A73 111 729 (United States Immigration Court, Houston, Texas, August 8, 2000). App. 13.

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing *En Banc* is unreported. *Moorani v. Gonzales,* No. 04-60971 (5th Cir. August 2, 2006). App. 25.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on May 26, 2006, and denied rehearing on August 2, 2006. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. §1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. §1252(a)(2)(B) because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D).

APPLICABLE LAW

INA §245(a), 8 U.S.C. §1255(a), which provides: "Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien

having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to the status of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."

INA §240(c)(7)(A), 8 U.S.C. §1229a(c)(7)(A), which provides: "In general. An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)."

INA §240(c)(7)(C)(i), 8 U.S.C. §1229a(c)(7)(C)(i), which provides: "In general. Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."

INA §240B(b)(1), 8 U.S.C. §1229c(b)(1), which provides: "In general. The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240 [8 U.S.C. §1229a], the immigration judge enters an order granting voluntary departure in lieu of removal and finds that – (A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 239(a) [8 U.S.C. § 1229(a)]; (B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding

the alien's application for voluntary departure; (C) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4) [8 U.S.C. § 1227(a)(2)(A)(iii) or § 1227(a)(4)]; and (D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so."

INA §240B(b)(2), 8 U.S.C. §1229c(b)(2), which provides: "Period. Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days."

INA §240B(d)(1), 8 U.S.C. §1229c(d)(1), which provides: "In general. Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien – (A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and (B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 240A, 245, 248, and 249" [8 U.S.C. §§ 1229b, 1255, 1258, and 1259].

8 CFR §1245.2(a)(1)(i), which provides: "In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."

8 CFR §1003.2(c)(1), which provides: "A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied

by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation."

8 CFR §1003.2(c)(2), which provides: "Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after

the date on which the final administrative decision was rendered in the proceeding sought to be reopened."

8 CFR §1003.2(d), which provides: "Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

8 CFR §1240.26(f), which provides: "Extension of time to depart. Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act."

STATEMENT OF THE CASE

This case involves the interplay between two sections of the Immigration and Nationality Act, one permitting a

motion to reopen removal proceedings to seek newly available relief from removal if filed within 90 days of the final removal order, and another that bars certain relief applications for ten years where the alien fails to timely depart the United States after having been granted the privilege of voluntary departure. Petitioner Jamal Moorani sought reopening of his removal to seek adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. §1255. His motion was granted by the BIA but, on remand, the Immigration Judge held that his adjustment of status was precluded by his failure to depart during the voluntary departure granted by the reopened BIA decision. On administrative appeal, the BIA affirmed without opinion and the Court of Appeals denied Mr. Moorani's petition for review.

The Court of Appeals held that the BIA had no jurisdiction to reopen the removal proceedings after the expiration of Petitioner's voluntary departure. Two other Circuits have held, however, that reopening a removal order has the effect of vacating that order. Indeed, the Seventh Circuit has specifically held that a failure to depart during a voluntary departure order that was subsequently reopened cannot be asserted to bar the new relief because there was no longer a voluntary de rture order with which the alien could fail to comply.

Further, the majority of United States Courts of Appeals that have considered the issue have held that the timely filing of a motion to reopen before the expiration of a voluntary departure period tolls the voluntary departure while the motion is under consideration, such that the relief application underlying the motion to reopen remains viable. The Fifth Circuit's decision in Petitioner's case therefore creates a split between the Circuits on both

questions, with the Fifth Circuit standing alone in its interpretation of the applicable statutes and regulations.

A. Jurisdiction of the Court of Appeals.

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts.

Petitioner Jamal Moorani first entered the United States on or about November 1, 1990, near New York, New York, without being admitted or paroled after inspection by an Immigration Officer. He is a member of the Shi'a Ismaili faith, a sect of Islam. Ismailis are a small minority in Pakistan, the vast majority of whose citizens are Sunni Muslims. After applying for asylum based upon a fear of religious persecution in Pakistan, Petitioner was placed in removal proceedings.

Mr. Moorani is unmarried. He has no criminal convictions. During the removal proceedings, Mr. Moorani was sponsored for lawful immigration by an employer willing to undertake the lengthy and complicated employment-based immigration process on his behalf. Eventually, an immigrant visa petition was approved by INS, making available to the Petitioner and alternative form of relief from removal through adjustment of status. Petitioner's attempt to reopen his removal proceedings to enable consideration of his adjustment of status forms the basis of the controversy herein.

C. Procedural History.

The Immigration Judge denied asylum in August 2000, but granted Petitioner a period of 60 days voluntary departure. App. 23. An appeal was taken to the BIA. The appeal of the asylum denial was dismissed by the Board on April 8, 2002. App. 11. In accordance with established BIA procedure, the Board's order of di missal extended for 30 days the voluntary departure period originally granted by the Immigration Judge. App. 12.

By the time of the Board's decision, however, Mr. Moorani had an immigrant visa petition filed on his behalf by a prospective employer and approved by the Immigration and Naturalization Service ("INS"). He had therefore become eligible to seek adjustment of status to lawful permanent resident pursuant to INA §245, 8 U.S.C. §1255. Petitioner filed a motion to reopen his removal proceedings before the expiration of the 30 day voluntary departure extension, and well within the 90 days allowed for such motions by statute and regulation. Over the objection of the INS, the BIA granted Mr. Moorani's motion to reopen and remanded the proceedings to the Immigration Judge for consideration of Mr. Moorani's application for adjustment of status. App. 9. The decision reopening the proceedings was issued on October 8, 2002, more than 30 days after the initial BIA decision dismissing Petitioner's asylum appeal.

1. Hearing on Remand.

On remand to the Immigration Judge, it was stipulated that Petitioner was eligible for and deserving of the requested adjustment of status but for the question of his failure to depart during the 30 day grant of voluntary

Missing Pages 10-25

As helpful as the Immigration Judge might find such attempts by federal appellate judges to rationalize her otherwise unexplained decision, that is not what the federal courts are expected to do. By affirming the denial of Petitioner's adjustment of status on grounds that were never articulated by the Immigration Judge or the BIA, the Court of Appeals committed error by disregarding the above decisions of this Court.

CONCLUSION

For the reasons shown, Petitioner urges that he was legally eligible for adjustment of status to lawful permanent resident notwithstanding that a period of voluntary departure granted in an order later reopened expired before his application could be considered. Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

QUAN BURDETTE & PEREZ, P.C.

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182 Fed.Appx. 352

In the
United States Court of Appeals
for the Fifth Circuit

No. 04-60971

JAMAL MOORANI,

Petitioner,

VERSUS

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
No. A73 111 729

(Filed May 26, 2006)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Jamal Moorani petitions for review of the decision of the Board of Immigration Appeals ("BIA") finding him statutorily ineligible for adjustment of status. We affirm

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

based on *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006).

Moorani is a native and citizen of Pakistan who entered the country illegally on or around November 1, 1990. The Attorney General initiated removal proceedings on October 31, 1997. Moorani conceded removability but requested asylum and withholding of removal and in the alternative, voluntary departure. After a hearing on the merits, the immigration judge ("IJ") denied asylum but on August 20, 2000, granted voluntary departure, requiring Moorani to leave the country within sixty days[1] or forfeit certain forms of discretionary relief from removal, including adjustment of status.[2]

Moorani appealed, which automatically tolled the running of the voluntary departure period.[3] While his appeal was pending, Miraj Wholesale ("Miraj") in Houston offered Moorani full-time employment. Miraj filed an Immigrant Petition for Alien Worker, which was approved on February 4, 2002.

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[1] Permission to depart the United States voluntarily at the conclusion of removal proceedings "shall not be valid for a period exceeding 60 days." 8 U.S.C. § 1229c(b)(2).

[2] The voluntary departure statute provides civil penalties, including "ineligib[ility] for a period of 10 years for any further relief" from removal under, *inter alia*, 8 U.S.C. § 1229b, which governs adjustment of status, for aliens who fail to leave the United States within the time specified. 8 U.S.C. § 1229c(d).

[3] *See Matter of Villegas Aguirre*, 13 I.&N. Dec. 139, 140 (BIA 1969) (holding that a timely appeal "tolls the running of the voluntary departure authorization."); *Matter of Chouliaris*, 16 I.&N. Dec. 168, 170 (BIA 1977) (affirming *Aguirre* to the extent that a "grant of voluntary departure made by an immigration judge shall not be jeopardized by taking an appeal").

The BIA dismissed the appeal on April 8, 2002, and granted Moorani thirty additional days' departure time.[4] On May 8, the final day of the departure period, Moorani filed a motion with the BIA to reopen removal proceedings and remand to the IJ to apply for adjustment of status, based on the approved petition.[5] The Attorney General argued that the motion should be denied because Moorani had overstayed the reinstated departure period and was therefore ineligible for adjustment. On October 8, the BIA granted the motion. Although noting the Attorney General's argument, the BIA stated that "the ... district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired."

On remand, the IJ permitted Moorani to file for an extension, but on August 19 the district director denied the request.[6] The IJ then issued a brief oral opinion

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[4] *See Chouliaris*, 16 I.&N. Dec. at 170 (modifying *Aguirre* to hold that where the IJ initially granted more than 30 days' departure time and that period has expired, "the respondent will be given 30 days from the date of our decision in which to depart voluntarily").

[5] An alien ordinarily "may file one motion to reopen [removal] proceedings[.]" 8 U.S.C. § 1229a(c)(7)(A). "The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." *Id.* § 1229a(c)(7)(B). "[T]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." *Id.* § 1229a(c)(7)(C)(i).

[6] Because the district director ultimately denied Moorani's request, we need not decide whether he would in fact have the authority to issue the extension contemplated by the BIA. *Compare* 8 C.F.R. § 1240.26(f) ("Authority to extend the time within which to depart voluntarily specified initially by an [IJ] or the [BIA] is only within the jurisdiction

(Continued on following page)

stating that the IJ lacked jurisdiction over Moorani's application for adjustment of status because Moorani had failed to comply with the voluntary departure order. The BIA affirmed without written opinion; therefore, the IJ's opinion becomes the basis for this court's review. *Soadjede v. Ashcroft*, 324 F.3d 830, 831-32 (5th Cir. 2003).

Moorani argues that the IJ erred because (1) his motion to reopen on May 8 effectively tolled the voluntary departure period pending decision by the BIA, and (2) the BIA's grant of his motion and remand to the IJ vacated the underlying voluntary departure order, erasing the requirement that Moorani leave the country by a certain date or be subject to civil penalties.[7] The Attorney General argues that both tolling and vacatur would undermine the statutory scheme, which sets strict conditions (including a sixty-day limit) on aliens who have been granted the privilege of voluntary departure.

In *Banda-Ortiz*, 445 F.3d at 391, we declined to read into the voluntary departure statute "the requirement that

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of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs.") *and Banda-Ortiz*, 445 F.3d at 388 n.2 ("Although [petitioner] filed his motion ... two days after his voluntary departure period expired, the INS granted a two-day *nunc pro tunc* extension, thereby rendering the motion timely.") *with* 8 C.F.R. § 1240.26(f) ("In no event can the total period of time, including any extension, exceed ... 60 days.").

[7] The IJ's opinion does not specify whether Moorani is ineligible for relief because one or both of these arguments are in error. It states, however, that "the respondent is not eligible for any form of relief for ten years from the May 2, 2002 [sic] deadline of the BIA's April 8, 2002 ruling." Therefore, we may assume, as the basis for our review, that the IJ considered the BIA to be without power to grant Moorani's motion on October 8 once his request for *nunc pro tunc* extension was denied.

the BIA automatically toll an alien's voluntary departure period during the pendency of a motion to reopen." *Banda-Ortiz* disposes of Moorani's first argument. Because tolling was unavailable, Moorani became ineligible for any further relief from removal after his voluntary departure period expired on May 8. *A fortiori*, we need not consider whether the BIA's decision *to* grant his motion vacated the underlying departure order and allowed Moorani to pursue his motion on the merits before the IJ. Under *Banda-Ortiz*, the grant of the motion itself was untimely, and the agency lacked any further jurisdiction over Moorani's case.

The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-111-729 – Houston Date: Oct 05, 2004

In re: MOORANI, JAMAL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Bates, Brian K., Esquire

ON BEHALF OF DHS:
Rory H. Potter, Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 73 111 729

In the Matter of	)	
JAMAL MOORANI	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE:

APPLICATIONS: Adjustment of status.[1]

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Brian K. Bates, Esquire	Dean Emmons, Esquire Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is before this Court on a granted motion to reopen. The respondent moved to reopen his case before the Board of Immigration Appeals to apply for adjustment of status with the Court. The Board granted the motion to reopen and remanded the case for further proceedings and noted that the record included a notice of approval for a visa petition filed for the respondent as a skilled worker by an employer, which was approved February 2, 2002. The respondent in this

[1] The Court does not have jurisdiction to proceed on adjustment of status in this case as the respondent had been granted voluntary departure and the respondent is not eligible for any form of relief for ten years from the May 2, 2002 deadline of the BIA's April 8, 2002 ruling.

case did not comply with a voluntary departure order and the attorney for the respondent was granted the opportunity to request that the Government grant an extension *nunc pro nunc* [sic] that is now (indiscernible). However, the Government has denied the *nunc pro tunc* request thereby making the respondent ineligible for relief for ten years. The Court does not have jurisdiction to proceed on the respondent's application for adjustment of status. The Board implied that it thought perhaps the Government might grant the *nunc pro tunc* request, but it has not. Thus, the Court has no jurisdiction to entertain the application for any form of relief in this particular case. Thus, the following order shall be entered.

ORDER

IT IS ORDERED that the respondent be removed from the United States to his native country of Pakistan pursuant to the previous order.

CLAREASE RANKIN-YATES
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-111-729 – Houston Date: Oct 08, 2002

In re: JAMAL MOORANI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro Se[1]

ON BEHALF OF SERVICE: Rory H. Potter
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] –
Present without being admitted or paroled

APPLICATION: Reopening

Now before the Board of Immigration Appeals is the respondent's motion to reopen timely filed on May 8, 2002. The motion to reopen will be granted, and the record will be remanded.

The respondent has moved to reopen in order to apply for adjustment of status with the Immigration Judge. We

[1] As a courtesy, we are sending a copy of this opinion to Brian K. Bates, Esquire, 5177 Richmond Avenue, Suite 800, Houston, Texas 77056-6736. The file does not contain a Form EOIR-27 Notice of Entry of Appearance As Attorney or Representative Before the Board of Immigration Appeals from attorney Bates, in conjunction with the current motion.

will grant the motion to reopen and will remand the case for further proceedings.[2]

A73 111 729

ORDER: The motion to reopen is granted, and the record is remanded to the Immigration Court for further proceedings consistent with this opinion.

/s/ Gustavus Villageliu
FOR THE BOARD

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[2] The record includes the notice of approval for the visa petition filed for the respondent as a skilled worker by an employer, which petition was approved on February 4, 2002, with a priority date of October 11, 2000. The latest available information reflects that relevant third preference visas are current for Pakistan, so that a visa is immediately available to the respondent. *See* United States Department of State Visa Bulletin, Vol. VIII, No. 50 (October 2002). Upon remand, all necessary documents, including the completed Form I-485 adjustment application and the visa petition approval notice, are to be filed with the Immigration Court, along with proof of payment of the requisite filing fees to the Immigration and Naturalization Service. *See* section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i); 8 C.F.R. § 245.2(a)(3)(iii) (2002). Both the respondent and the Service will have the opportunity to present any and all available evidence relevant to the respondent's statutory and discretionary eligibility for adjustment of status. The Service suggests that the respondent may be ineligible for adjustment due to his failure to voluntarily depart within the scheduled period as reinstated in our earlier order, pursuant to section 240B of the Act, 8 U.S.C. § 1250b, and *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), *aff'd, Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998). However, the Service's district director, under some circumstances, may grant a *nunc pro tunc* extension of voluntary departure, which has the effect of not only extending an alien's voluntary departure time but also restoring voluntary departure to the date on which it expired.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-111-729 – Houston Date: Apr 08, 2002

In re: MOORANI, JAMAL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Bates, Brian K., Esquire

ORDER:

PER CURIAM. The appeal is dismissed. The appellant checked Box 6 on the Notice of Appeal (Form EOIR-26) indicating that a separate written brief or statement would be filed in addition to the reasons for appeal accompanying the Notice of Appeal. Block 6 is immediately followed by a clear warning that the appeal may be subject to summary dismissal if the appellant indicates that such a brief or statement will be filed and, "within the time set for filing, you fail to file the brief or statement and do not reasonably explain such failure." The appellant was granted the opportunity to submit a brief or statement in support of the appeal. However, the record indicates that appellant did "not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing." 8 C.F.R. § 3.1(d)(2)(i)(D). Moreover, upon review of the record, we are not persuaded that the Immigration Judge's ultimate resolution of this case was in error. Accordingly, we find that summary dismissal is appropriate pursuant to the provisions of 8 C.F.R. § 3.1(d)(2)(i)(D).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ John Guendelsberger
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 73 111 729 August 8, 2000

In the Matter of	)	
JAMAL MOORANI	)	IN REMOVAL PROCEEDINGS
Respondent	)	

NTA CHARGE: Section 212(a)(6)(A)(i) (present without admission or parole).

APPLICATIONS: Section 208(a) (asylum), Section 241(b)(3) (withholding of removal), Section 240B(b) (voluntary departure).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Brian K. Bates, Esquire Gordon Kwan and Associates 5177 Richmond Avenue, Suite 800 Houston, Texas 77056-6736	Rory Potter, Esquire Assistant District Counsel Houston, Texas

ORAL DECISION AND ORDER
OF THE IMMIGRATION JUDGE

The instant record relates to a male alien native and citizen of Pakistan who was placed into removal proceedings pursuant to the issuance of a Notice to Appear dated October 29, 1997. *See* Exhibit 1. The Service charges that the respondent is subject to removability as an alien who is present in the United States without being admitted or paroled. Specifically, the Government alleges that the respondent is not a citizen or national of the United

States, that he is a native and citizen of Pakistan, and that he entered the United States at or near New York, New York, on or about November 1, 1990, and that at that time he was not admitted or paroled after inspection by an Immigration Officer. *See id.* The respondent, represented by counsel, admitted the truth of the four factual allegations contained in the Notice to Appear and conceded that in fact he was subject to removal on the charge set forth therein. Based on the admissions and concessions of the respondent, through counsel, I do find that his removability has been established by evidence the clear and convincing standard in the record.

The respondent declined to designate a country of removal and instead desired to proceed with an application for asylum. The respondent evidently had filed an application for asylum with the Service on or about 1994. That application is in the record as Exhibit 2. The respondent was given the opportunity to supplement that application. Such supplement is in the record as Exhibit 3. In addition, there are documentary evidence that have been submitted on behalf of the respondent and in support of his application for asylum, specifically, Group Exhibit 4 and 5. The respondent, in order to be eligible for asylum, must establish that he meets the definition of a refugee as that term is found in the Immigration and Nationality Act. Specifically, a refugee is a person who is outside one's country of nationality or citizenship and who is unable or unwilling to return to such country of nativity or citizenship due to a well-founded fear of persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. The respondent's fear to asylum or alleged fear in this case is based on his religion. Specifically, the respondent is a member of the Shiite

Muslim community in Pakistan, specifically, a particular sect known as the Ismaili sect. The Ismaili sect, according to the respondent's testimony, is different from the regular Sunni Muslims and other Shiite Muslims in that the Ismaili sect allows women to participate in prayer and worship in the Ismaili mosque. This evidently is contrary to the other factions of the Muslim faith.

The respondent submitted his testimony in support of his application for asylum. The respondent did testify that he was born in Pakistan in 1969, and he was approximately 20 years of age at the time that he came to the United States. He had worked in his father's business in Pakistan, which was in a clothing cleaning business, as well as going to school. The respondent's brother is present in the United States and is currently a United States citizen. The respondent expects his father to arrive in the United States within the near future as an immigrant based on a petition submitted by the respondent's brother. The respondent stated that his entire family is of the Ismaili faith. The respondent's brother returned to Pakistan sometime last year in order to be with the respondent's father when he was ill and hospitalized. The respondent stated that this is due to his father's advanced age.

Regarding his religion, the respondent stated that he was active in the Ismaili religion. Specifically, he states that he was involved as a guard or one that would help the ladies into the mosque for prayer. The respondent testified that approximately 10 to 15 times during his service as a security individual that he was harassed by Sunni Muslims to the point that fights would erupt. He testified that on six to seven occasions he actually was physically injured. He indicated that he had been hospitalized on

several occasions and one time for a period of a week. He also testified that on one occasion a friend was standing next to the respondent during the period of time that he was conducting the security activities and that Sunni Muslims harassed him and his friend, that a fight erupted and that the respondent's friend was actually shot during the incident. The respondent testified that he was not shot nor hurt but that his friend was killed or died due to this shooting incident. When questioned concerning the date, the respondent's closest time frame was between 1988 or 1989. The respondent also claims that his cousin was shot. He states that his cousin evidently was shot due to his activities as a security guard on the street. The respondent stated that the reason that he was able to get the cousin's medical documentation was that the cousin was severely injured.

The respondent testified concerning the arrest that was referenced in his application for asylum. Specifically, the respondent was arrested due to an altercation between MQM and PPP party individuals, a fight erupted. The respondent was next to his friends who were MQM members and that the police came and arrested various individuals, one of which was the respondent. The respondent testified that he was not a member of any political party and that he was not claiming persecution due to any political activities in his home country.

On cross-examination, it was brought out that the respondent took a period of over three years in order to file his application for asylum. The respondent indicated that this was due to his lack of knowledge of asylum laws due to him coming from a third world country. The respondent testified that his family, specifically his father and stepfather, still reside in the family home in Karachi where the

respondent was a resident prior to his coming to the United States. The respondent testified about his educational background, specifically that he had gone to public school in Pakistan as well as attended a private school and college. He did indicate that he did not attend the university but that he did attend a school called the Pakistan Academy, which is a private school, for approximately three to four years. Concerning the lack of medical documentation submitted for the respondent's alleged injuries, he stated that in Pakistan medical records are not kept and that it is a third world country. He also indicated that the hospital had moved and that there are no computers in that country. The respondent stated that he did send his father to get these medical records. There were no medical records submitted on behalf of the respondent concerning his alleged hospitalization. The first issue to be determined in any asylum or withholding of removal. To qualify for asylum case where the respondent is the only testifying witness is his credibility. In this case, I find that the respondent is not a wholly credible witness for various reasons. Firstly, the respondent made testimonial claims to 10 to 15 fights, including six to seven times when he claims he was physically injured. He did state that he was hospitalized for a period of one week. The testimony of the respondent would appear to claim more hospitalizations than the one but did reference or emphasize the one week hospitalization. It is noteworthy that not one mention of any of the altercations nor hospitalizations were made in the respondent's initial application for asylum, only the supplemental application would tend to reference the altercations or fights. The respondent's claims that there are no records of his medical treatment presented based on Pakistan being a third world country and that there are no computers nor hospitalization records and that the

hospital has moved, I do not find to have the ring of truth. In fact, the respondent's documentary evidence does contain medical records of his cousin. The respondent, if in fact he was hospitalized for the significant period of time that he claims, would have in all reasonable likelihood been able to obtain such documentary evidence of record. The documents submitted on behalf of the respondent's cousin are fairly complete and specific indicating injuries and type of treatment. It is reasonable to assume that if the respondent was in fact hospitalized as claimed that there would have been such records for his hospitalization. The respondent, in addition to his testimony, was not specific concerning any of the injuries that he claims to have had. Any injury that was inflicted upon the respondent that would have landed him in the hospital for a period of a week would have been a sufficiently severe injury that there should have been some kind of documentation available for such an injury. The respondent did specifically testify about his little finger being broken. However, this injury was in reference between the MQM and the PPP altercation where the respondent was arrested. The respondent's only statement concerning a specific injury was referencing this altercation when the respondent was arrested. As the respondent stated, it was not related to any religious activity. The respondent did not give any testimony nor any evidence concerning even an estimated close date of the hospitalization. Such a traumatic experience would have been much more detailed if it fact it would have occurred. For this reason I do find that the aspect of the respondent's alleged hospitalization to be strained as far as credibility.

Another aspect of the respondent's case that is fairly significant that leave the respondent somewhat lacking in

credibility is the alleged shooting incident. Specifically, the respondent claimed that he was standing next to a co-worker friend when they were on duty as security at his mosque. The respondent indicated that the respondent and his friend became involved in an altercation between the Sunni extremists. The respondent then claimed that as a result of this fight between these extremists, that shots were fired and that respondent's friend was mortally wounded. The respondent could not even give a year when this supposed incident happened. It was sometime in 1988 or 1989. This Court finds it incredible that such a traumatic incident where one's life is in jeopardy would have been a significant incident in an individual's life and that the respondent's inability to give a specific time of such incident is not credible. In addition, this incident is remarkably left out of both of the respondent's applications at Exhibit 2 and Exhibit 3 of the supplement. It is, as stated, not credible that such an event would have been overlooked by the respondent in filling out his application for asylum. It would appear that the respondent's testimony today would be an embellishment upon the true facts in order to support his claim for asylum in the United States. In looking at this it appears that the respondent taking over three years to apply for asylum in the United States is not consistent with an individual that truly fears for his life if returned to his home country. It would be more plausible that an individual that fears, as the respondent claims to fear, would have sought the benefit and aid of the United States Government fairly contemporaneous with his arrival but definitely not a period of over three years after arrival. I do not find it plausible that the respondent's claims that coming from a third world country he was not versed and such prevented him from submitting his application for asylum. It would appear

that the respondent, in fact, is a fairly educated individual and was so upon his arrival in the United States, sufficiently educated and world wise that he was able to obtain a photo switched passport and enter the United States at New York. Therefore, I do find that the respondent is not a wholly credible witness referencing his claim.

Even looking at the claim of fear of persecution and looking at the well-founded fear standard, none of the claims that the respondent makes on his first application for asylum of torture, cruelty, or persecution, or being threatened with death were supported by any testimony. Specifically, statements on the first application for asylum do not coincide with the State Department materials. The respondent's application would tend to indicate a systematic nationwide persecution of the Shiites from the Sunni Sect. The Ismaili sect is in fact a part of the Shiite sect according to the State Department materials. It would appear that there is ample evidence that in fact the Sunni and Shiite sects of the Muslim faith have at various times been contrary to each other, even to shootings and killings. However, it would not appear that it is as systematic as the respondent would claim as the State Department materials would indicate the country being over 100 million individuals does, and where persons take their religion fairly seriously, does lend itself to violence between these various groups. The materials do indicate that there is violence, specifically between Sunni and Shiite groups. However, it also indicated the State Department materials, Exhibit 6, page 9, would indicate that Shiites are not systematically discriminated against by the other elements in the Pakistani society as opposed to other Shiite individuals in the other Arab countries. The respondent's family situation would indicate that in fact the

State Department materials at Exhibit 6 are in fact accurate. The respondent's family is very well to do in their home country, owning their home, several businesses. In addition, contrary to believing that the respondent would suffer a systematic nature of persecution if he were returned, is the fact that his brother, who is in fact an Ismaili Muslim, returned to Pakistan just last year to visit his father. If in fact the family would be systematically harmed as he states, it is reasonable to believe that the brother would not have returned to Pakistan. The respondent's fear of harm would apparently be the result of societal religious unrest in his home country. A well-founded fear of persecution has been addressed by the Supreme Court at being somewhat in the ten percent nature. The respondent, specifically, cannot show that he in fact has a well-founded fear of persecution based on his religion if he were returned to Pakistan, approximately 20% of the population is in fact Shiite Muslim. His being an Ismaili is a smaller portion of the Shiite sect. It is interesting to note that in the State Department materials no specific references are generally made to the Ismaili sect of the Shiite Muslims. There are some aspects or some mention made of the Ismaili sect, however, none that would indicate any special attention from the Sunnis as far as being a member of the Shiite sect and Ismaili. The only reference that the Court was able to find was at Exhibit 5, page 56, where apparently in 1999 there was a Sunni religious leader who was killed along with his nephew at the hands allegedly of one Ismaili. The Sunni religious parties evidently requesting that the Aga Khan foundation, which is considered or stated in this document to be a community service organization sponsored by Ismaili Shiites, the Sunni religious parties asked that that be closed. Evidently, this is an isolated incident where the

Sunni religious party leader was killed based on a property dispute. This incident happened in August 19, 1999. The implication, even assuming all the facts as stated as true, would appear to be that the respondent at most would have apprehension due to the religious unrest in his home country. Accordingly, I find that the application for political asylum, accepting the facts as presented, would still not establish that the respondent has a well-founded fear of persecution based on his being a member of the Shiite Muslim sect (Ismaili faction). Therefore, I do find that the respondent's application for asylum must be denied.

The application for asylum is also to be considered an application for withholding of removal. The burden of referencing an application for withholding of removal is of course much greater than that of asylum. In other words, it must be shown that it is more likely than not that the respondent would be persecuted if returned to Pakistan. Since the lower burden referencing asylum has not been met, I find that the application for withholding of removal must also be denied.

The respondent has requested voluntary departure from the United States. I, in finding him incredible, do not make a finding that he has given false testimony. I find that he is in fact eligible for voluntary departure. His ties to the United States, specifically a ten year sojourn in this country as well as a United States citizen brother, would in fact indicate that the respondent should merit voluntary departure from this country. In actuality, it is quite possible the respondent, in the future, may well be the beneficiary of possible immigration to this country due to his father's close immigration as well as his United States citizen brother. Therefore, the Court does not feel that

removal from the United States would be in the interest of the United States nor the respondent. And accordingly, voluntary departure will be granted. The Court will grant the respondent the maximum amount of voluntary departure in that he has evidently a substantial amount of ties and equities to this country. And accordingly, the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for asylum will be and the same is hereby denied.

IT IS FURTHER ORDERED that respondent's application for withholding of removal be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent be granted voluntary departure from the United States on or before October 6, 2000.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be conditioned upon his posting a bond in the amount of $500 to be posted on or before August 15, 2000.

IT IS FURTHER ORDERED that should the respondent fail or refuse to depart voluntarily when and as required or fail or refuse to post the voluntary departure bond when and as required, that the voluntary departure will be withdrawn automatically and that the following order would take immediate effect.

IT IS ORDERED that the respondent be removed from the United States to Pakistan on the charge contained in the Notice to Appear.

HOWARD VAN WINKLE
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60971

JAMAL MOORANI

Petitioner

v.

ALBERTO R. GONZALES, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appels

ON PETITION FOR REHEARING EN BANC

(Opinion 05/26/06, 5 Cir., ___, ___ F.3d ___)

(Filed Aug. 2, 2006)

Before KING, SMITH and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehering is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Jerry Smith
United States Circuit Judge